STANDARD CHARTERED BANK

v.

BUTIZA SDN. BHD. & ORS.

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CIVIL SUIT NO. K. 126 OF 1988]
6 DECEMBER 1991

CIVIL PROCEDURE: *Ex parte application for injunction - Judgment default - Delay - Laches - Stale application - Whether lawyers are also expected to advise on the procedural and substantive laws and chances of success of litigation - Whether O. 29 r. 2(1) Rules of the High Court 1980 is applicable.*

This was a 1988 matter and was actually disposed of on 4 May 1988 when the judgment in default of defence under O. 19 r. 2 was entered against the first and second defendants. The third defendant had the judgment in default of appearance entered against him on 10 May 1988.

Pursuant to a prohibitory order dated 5 April 1991, the defendants' lands in Wilayah Persekutuan Labuan were to be seized and to be sold by public auction on 14 November 1991. Consequently, the first defendant was informed about the application for execution and of the public auction.

The issue before the Court was the laches and whether the defendant's application for injunction proper in law.

Held:

[1] The learned Judge opined that the "cause or matter" was the claim filed way back on 12 March 1988. The judgment in default of appearance was granted in the normal course of events and in accordance with the Rules of the High Court 1980. If there was any defect, the defendants should have taken suitable remedial or corrective action as soon as possible but no later than a few months after such judgment had been entered. Any party aggrieved should not wait till the execution is near and then try to arrest it. Order 29 r. 2(1) is not applicable here.

[2] In as much as this Court will not permit plaintiffs to pursue their claims when there has been delay in prosecuting such claims, this Court will also not permit stale applications of defendants to set aside judgments obtained.

[Defendants ex parte application dismissed with costs.]

Cases referred to:
Tian Yan Onn Dvpt. Bhd. v. National Holdings Ltd. & Ors. [1988] 2 MLJ 669 ***(foll)***
Syarikat Joo Seng & Anor v. Habib Bank [1986] 1 MLJ 129 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 19 rr. 2, 7(1), O. 29 r. 2(1)

For the defendants/applicants - Collin Goonting; M/s. Collin Goonting & Co.

JUDGMENT

Syed Ahmad Idid JC:

I heard the *ex-parte* application by the three defendants under O. 29 r. 2 of the Rules of High Court 1980. Mr. Collin Goonting, of Counsel for the three defendants, had filed the application on 9 November 1991 together with a certificate of urgency.

At the hearing on 13 November 1991, the 2nd defendant's affidavit filed on 6 November 1991 was read out as grounds in support of the application for the injunction.

This was a 1988 matter and was actually disposed of on 4 May 1988 when the judgment in default of defence under O. 19 r. 2 was entered against the 1st and 2nd defendants. The 3rd defendant had the judgment in default of appearance entered against him on 10 May 1988.

The matter appeared to have been resolved until 25 May 1990 when the plaintiffs filed a creditors petition against the 2nd defendant (see Bankruptcy Petition No. K. 131 of 1990, Bankruptcy Notice No. K. 165 of 1990).

The Senior Assistant Registrar on 8 October 1991 issued an order that the defendants' lands listed as from (a) to (s) in the District (should be in Wilayah Persekutuan) of Labuan seized under a prohibitory order dated 5 April 1991 and registered under Serial No. 00009030 dated 8 April 1991 be sold by public auction on 14 November 1991 at the High Court in Borneo at Kota Kinabalu.

The law firm of M/s. Skinner, Lind, Robertson, Willie, Wong & Chin, Counsel for the plaintiffs, in their letter dated 19 October 1991 by courier informed the 1st defendant regarding their application for execution No. 31 of 1991 and of the public auction.

Mr. Goonting, of Counsel of the defendants cited O. 29 r. 2(1). But before one goes to that rule, one has to comply with O. 29 r. 1, that is that an injunction may be applied for by "any party to a cause or matter"... and the rule goes on to restrict the "cause or matter" to "writ, originating summons, counterclaim or third party notice." To my question, Mr. Goonting answered that his clients' *ex-parte* summons-in-chambers dated 9 November 1991 cannot come under any of those heads.

Courts do not like laches and this is one instance where the Defendants should have filed their application to set aside the judgment way back within a few months of or around 4 May 1988. The case of *Tian Yan Onn Dvpt. Bhd. v. National Holdings Ltd. & Ors.* [1988] 2 MLJ 669 held that such applications "must be made promptly although no time limit is fixed. What is reasonable time within which such an application is to be filed depends on the circumstances of each case". There are several judgments which restrict such period of inactivity, that is the time when the parties neglected to act, to less than a year. In the *Tian Yan Onn's* case (*supra*) the delay of seven months and twelve days was "totally unreasonable and inexcusable". In other words, if one is aggrieved, we must act quickly and not leave the matter to such a late stage exceeding a year (as in our instant case).

Mr. Goonting cited the case of *Syarikat Joo Seng & Anor. v. Habib Bank, SC* [1986] 1 MLJ 129. There the respondents did not comply with O. 19 r. 7(1) but in our instant case there is no requirement of such a nature.

I am of the opinion that the "cause or matter" was the claim filed way back on 12 March 1988. The judgment in default of appearance was granted in the normal course of events and in accordance with the Rules of the High Court 1980. If there was any defect, the defendants should have taken suitable remedial or corrective action as soon as possible but

no later than a few months after such judgment had been entered. Any party aggrieved should not wait till the execution is near and then try to arrest it. Order 27 r. 2(1) is not applicable here.

The Court appreciates that lawyers act under instructions of their clients but lawyers are also expected to advise on the procedural and substantive laws and the chances of success of litigation. In as much as this Court will not permit plaintiffs to pursue their claims when there has been delay in prosecuting such claims, this Court will also not permit stale applications by defendants to set aside judgments obtained, as in this case, way back in 1988.

I therefore dismiss the defendants' *ex-parte* summons-in chambers application with costs.

Also found at [1992] 2 CLJ 1082